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Paper No. 15

In re Application of : DECISION ON PETITION
Michael T. Morman et al :
Serial No. : 10/037,457 :
Filed : December 31, 2001 :
For : All Direction Stretchable Multiplayer Diaper :


This is a decision on petitioner's request filed April 16, 2004, by which petitioner requests the waiver of the extension of time fee to respond to the Notice of Non-Compliant Amendment mailed December 23, 2003. Petitioner alleges that he did not receive the Office letter in question. Petitioner states that he became aware of the mailing of the Notice of Non-Compliant Amendment upon a routine status check of the PAIR system on March 30, 2004. Petitioner, on March 31, 2004 contacted the Examiner and obtained a courtesy copy of the Office action in question. The payment of extension of time fees is mandated by statute, 35 USC 41, and therefore, cannot be waived. The petition is being considered under 37 CFR 1.181, as a request to have the Office action of December 23, 2003 remailed due to non-receipt of the action. No petition fee is required.

Section 711.03(c) of the MPEP sets forth guidelines for establishing non-receipt of Office correspondence. Although the evidentiary showing set forth therein is discussed in the context of withdrawing a holding of abandonment, that evidentiary showing is acceptable under the circumstances in the instant application in which applicant becomes aware of the mailing of an Office action which has not been received by applicant, even though the application has not yet been held to have become abandoned. In order to overcome the presumption of delivery of an Office action, a practitioner must submit the following: (1) a statement from the practitioner stating that the Office action was not received by practitioner; (2) a statement attesting to the fact that a search of the file jacket and docket record indicates that the Office action was not received; and (3) a copy of the docket record where the non-received Office action would have been entered had it been received and docketed. See 1156 OG 53.

The request filed April 16, 2004 includes all the above elements, establishing that the Office action of December 23, 2003 was not received and the request to have the Office action remailed is GRANTED. Under normal circumstances, the Office action in question would be remailed setting forth a new period for response. However, since concurrently with the petition, petitioner has filed a reply to the Office action of December 23, 2003, the Office action will not be remailed. Instead, upon the mailing of this decision, the application will be forwarded to the examiner, via the Legal Instruments Examiner, for entry and consideration of the concurrently filed response.

Summary: Request to have Office action of December 23, 2003, remailed GRANTED.

Actual remailing of Action not necessary in view of petitioner's receipt of courtesy copy on March 31, 2004 and filing of response thereto concurrently with instant petition.



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